Sivapiran a/l Sabapathy v Lim Yoke Kong

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R8-11-97-89
EUSOFF CHIN J
16 MARCH 1991

Damages (Personal Injury or Death) *— Limitation period — Whether claim for damages for personal injury time-barred — Plaintiff unable to ascertain identity of insurers of defendant's motor vehicle — Concealment by insurers — Insurers identified only after expiry of limitation period — Whether concealment amounted to 'fraud' within meaning of s 29 of the Limitation Act 1953 — When time began to run — Need to distinguish between 'right of action' and 'cause of action' — Limitation Act 1953 ss 6 & 29 — Road Traffic Ordinance 1958 s 80*

Limitation *— Claim for damages for personal injury — Whether time-barred — Plaintiff unable to ascertain identity of insurers of defendant's motor vehicle — Concealment by insurers — Insurers identified only after expiry of limitation period —Whether concealment amounted to 'fraud' within meaning of s 29 of the Limitation Act 1953 — When time began to run — Need to distinguish between 'right of action' and 'cause of action' — Limitation Act 1953 ss 6 & 29 — Road Traffic Ordinance 1958 s 80*

Words and Phrases *— 'Fraud' — Limitation Act 1953 s 29*

On 1 April 1977, the appellant ('the plaintiff') was knocked down by the respondent ('the defendant') who was riding motor cycle No AF3571 ('the motor cycle'). The plaintiff suffered personal injuries. In August 1979, he engaged solicitors and called on them again in early 1982. On 31 March 1982 they wrote to the police for the relevant police reports in order to ascertain the identity of the defendant. On the same day, the solicitors wrote to the Registrar and Inspector of Motor Vehicles ('the RIMV'), Perak, to ascertain the identity of the insurers of the motor cycle. On 5 May 1982, the RIMV, Perak informed the plaintiff's solicitors that the relevant file was in Selangor. The solicitors then wrote to the RIMV, Selangor, on 18 May 1982. On 8 June 1982, the RIMV, Selangor wrote to the defendant, requesting him to supply insurance particulars of his motor cycle but the defendant did not reply. The plaintiff's solicitors sent an AR registered letter on 15 June 1982 to the defendant but it was returned undelivered. On 10 August 1982, the plaintiff's solicitors wrote to the Motor Insurer's Bureau of West Malaysia ('the MIB'), requesting them to ascertain the identity of the insurers of the motor cycle. Although a circular was sent out by MIB to all insurance companies on 16 August 1982, MIB was still unable to ascertain which insurance company was the insurer by 31 March 1983 when the six-year limitation period expired.

On 28 March 1984, the plaintiff was informed by MIB that the motor cycle was insured with East West Insurance Bhd ('the insurance company'). On 11 April 1984, the plaintiff's solicitors wrote to the insurance company, requesting them to confirm whether they were the insurers for the motor cycle. Without confirming whether

they were the insurers for the motor cycle, the insurance company replied on 13 June 1984 that they would seek their solicitors' opinion. On 20 October 1984, the insurance company's solicitors, without admitting that the insurance company were the insurers, wrote to the plaintiff's solicitors to the effect that the matter was time-barred. It was only on 23 July 1985 that the insurance company's solicitors said that the insurance company had refused to take over the conduct of the defence, contending that the claim was time-barred.

Pending the hearing of the question raised in another similar case by the plaintiff's solicitors in the Supreme Court as to whether time should run in a case where the plaintiff did not know the identity of the insurers of the defendant's motor vehicle, the defendant's solicitors agreed that the plaintiff should not file any claim until the Supreme Court had given its decision. The Supreme Court decided that the plaintiff should file his claim in the High Court and the defendant there could then raise the issue of limitation, and argue the issue at the proper trial of the claim.

On 20 May 1986, the plaintiff gave the statutory notice to the insurance company under s 80 of the Road Traffic Ordinance 1958 and filed his claim for damages against the defendant on 22 May 1986. The learned magistrate dismissed the claim on the ground that the claim was time-barred. The plaintiff appealed. It was contended on behalf of the plaintiff that there was fraud on the part of the insurance company by concealing the fact that they were the insurers of the motor cycle, and as such, the period of limitation should not begin to run until the discovery of the fraud.

Held, allowing the appeal:

(1) 'Cause of action' must be distinguished from 'right of action'. Section 6 of the Limitation Act 1953 deals with 'cause of action' and s 29 of the same Act deals with the 'right of action'. Section 29 provides that the period of limitation shall not begin to run in any case where the right of action is concealed by the fraud of the defendant, or his agent, until the plaintiff has discovered the fraud, or could by reasonable diligence have discovered it.

(2) When considering s 29(b) of the Limitation Act 1953, where it is shown that the right of action of the plaintiff is concealed by the fraud of the insurance company, that concealment should be treated as that of the defendant in the action.

(3) The court was satisfied that although the *cause of action* in this case accrued on the date of the accident, ie 1 April 1977, the *right of action* of the plaintiff had been concealed by the fraud of the defendant and the insurance company. It was most unconscionable for the insurance company to conceal itself from the knowledge of the plaintiff in order to take advantage of the limitation period, and to prevent the plaintiff from proceeding against the defendant. The plaintiff could only enforce this right of action on 28 March 1984 when the plaintiff was first told by the MIB of the

name of the insurance company which had insured the defendant's motor cycle.

(4) 'Fraud' as envisaged under s 29 of the Limitation Act 1953 is by no means limited to common law fraud or deceit. No degree of moral turpitude is necessary to establish fraud within this section. The phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one party to do to another party.

(5) What had been done by the insurance company amounted to fraud under s 29 of the Limitation Act 1953, and by that fraud, the insurance company had concealed the right of action of the plaintiff to sue the defendant within the six-year limitation period. Time therefore began to run from 28 March 1984 when the plaintiff was informed of the name of the insurers, not from 1 April 1977, the date of the accident. Accordingly, the claim was not time-barred.

[Bahasa Malaysia summary

Pada 1 April 1977, perayu ('plaintif') telah dilanggar oleh responden ('defendan') yang sedang menunggang motorsikal No AF 3571 ('motorsikal itu'). Plaintif telah mengalami kecederaan diri. Pada Ogos 1979, beliau telah mengambil khidmat peguamcara dan telah memanggil mereka sekali lagi pada awal 1982. Pada 31 Mac 1982, mereka menulis kepada pihak polis untuk laporan polis yang relevan supaya dapat mengenalpasti identiti defendan. Pada hari yang sama, peguamcara itu telah menulis kepada Pendaftar dan Inspektor Kenderaan ('JPJ'), Perak, untuk mengenalpasti identiti syarikat insuran motorsikal itu. Pada 5 Mei 1982, JPJ Perak memberitahu peguamcara plaintif bahawa fail yang relevan berada di Selangor. Peguamcara itu kemudiannya menulis kepada JPJ Selangor pada 18 Mei 1982. Pada 8 Jun 1982, JPJ Selangor menulis kepada defendan, memintanya memberikan butir-butir insuran motorsikalnya tetapi defendan tidak menjawab. Peguamcara plaintif mengirim sepucuk surat berdaftar AR pada 15 Jun 1982 kepada defendan tetapi ia dikembalikan kerana tidak dapat dihantar. Pada 10 Ogos 1982, peguamcara plaintif menulis kepada Biro Syarikat Insuran Motor Malaysia Barat ('Biro itu'), meminta mereka memastikan identiti syarikat insuran motorsikal itu. Walaupun sepucuk pekeliling telah dihantar oleh Biro itu kepada semua syarikat insuran pada 16 Ogos 1982, Biro itu masih gagal mengenalpasti syarikat insuran manakah yang terlibat menjelang 31 Mac 1983 apabila had masa enam tahun berakhir.

Pada 28 Mac 1984, plaintif telah diberitahu oleh Biro itu bahawa motorsikal itu diinsurankan dengan East West Insurance Bhd ('syarikat insuran itu'). Pada 11 April 1984, peguamcara plaintif menulis kepada syarikat insuran itu, meminta mereka mensahkan sama ada merekalah yang menginsurankan motorsikal itu. Tanpa mensahkan sama ada mereka yang menginsurankan motorsikal itu, syarikat insuran itu telah menjawab pada 13 Jun 1984 bahawa mereka akan meminta

pendapat peguamcara mereka. Pada 20 Oktober 1984, peguamcara syarikat insuran, tanpa mengaku bahawa syarikat insuran itu telah menginsurankan motorsikal itu, telah menulis kepada peguamcara plaintif bahawa perkara itu telah dihalang had masa. Cuma pada 23 Julai 1985 peguamcara syarikat insuran itu mengatakan bahawa syarikat itu telah enggan mengambil alih pengendalian pembelaan, atas alasan tuntutan itu telah dihalang had masa.

Sementara menantikan pendengaran soalan yang ditimbulkan dalam suatu kes lain yang sama oleh peguam plaintif di Mahkamah Agung tentang sama ada masa harus berjalan dalam kes di mana plaintif tidak mengetahui identiti syarikat insuran kenderaan defendan, peguam defendan bersetuju bahawa plaintif tidak patut memfailkan apa-apa tuntutan sehingga Mahkamah Agung memberikan penghakimannya. Makhamah Agung telah membuat keputushan bahawa plaintif harus memfailkan tuntutannya di Mahkamah Tinggi dan defendan di sana boleh kemudiannya menimbulkan isu had masa, dan berhujah isu itu di perbicaraan sebenar tuntutan itu.

Pada 20 Mei 1986, plaintif telah memberi notis statutori kepada syarikat insuran itu di bawah s 80 Ordinan Trafik Jalanraya 1958 dan memfailkan tuntutannya untuk ganti rugi terhadap defendan pada 22 Mei 1986. Majistret telah menolak tuntutan itu atas alasan had masa. Plaintif telah merayu. Telah didakwa bagi pihak plaintif bahawa terdapat fraud pada pihak syarikat insuran kerana menyelindungi hakikat bahawa merekalah yang menginsurankan motorsikal itu, dan lantaran itu, had masa tidak harus mula berjalan sehingga perjumpaan fraud itu.

Diputuskan, membenarkan rayuan itu:

(1) 'Kausa tindakan' harus dibezakan daripada 'hak membawa tindakan'. Seksyen 6 Akta Had Masa 1953 adalah berkenaan dengan 'kausa tindakan' dan s 29 Akta yang sama adalah berkenaan dengan 'hak membawa tindakan'. Seksyen 29 memperuntukkan bahawa jangka waktu had masa tidak harus mula berjalan dalam apa-apa kes di mana hak membawa tindakan diselindungi oleh fraud pihak defendan, atau ejennya, sehingga plaintif telah menjumpai fraud itu, atau boleh dengan ketekunan yang munasabah menjumpainya.

(2) Apabila mempertimbangkan s 29(b) Akta Had Masa 1953, di mana ditunjukkan bahawa hak plaintif membawa tindakan diselindungi oleh fraud syarikat insuran, penyelindungan itu harus disifatkan sebagai penyelindungan defendan dalam tindakan itu.

(3) Mahkamah berpuas hati bahawa walaupun *kausa tindakan* dalam kes ini terakru pada tarikh kemalangan, iaitu 1 April 1977, *hak plaintif membawa tindakan* telah diselindungi oleh fraud pihak defendan dan syarikat insuran itu. Adalah sungguh tidak berpatutan bagi syarikat insuran itu menyelindungi dirinya daripada pengetahuan plaintif supaya mengambil peluang menggunakan jangka waktu had masa, dan menyekat plaintif daripada meneruskan

prosiding terhadap defendan. Plaintif cuma boleh menjalankan haknya membawa tindakan pada 28 Mac 1984 apabila diberitahu buat pertama kalinya oleh Biro itu tentang nama syarikat insuran yang telah menginsurankan motorsikal defendan.

(4) 'Fraud' seperti yang dijangka di bawah s 29 Akta Had Masa 1953 tidak dalam apa cara sekalipun terhad kepada fraud common law atau penipuan (deceit). Tiada takat kekejian moral perlu untuk membuktikan fraud mengikut seksyen ini. Rangkai kata itu merangkumi kelakuan yang, memandangkan suatu hubungan khas di antara dua pihak yang berkenaan, adalah satu perkara yang tidak berpatutan yang dibuat oleh satu pihak ke atas pihak yang satu lagi.

(5) Apa yang telah dibuat oleh syarikat insuran itu berjumlah kepada fraud di bawah s 29 Akta Had Masa 1953, dan oleh kerana fraud itu, syarikat insuran itu telah menyelindungi hak plaintif membawa tindakan memulakan guaman terhadap defendan dalam jangka waktu had masa enam tahun itu. Masa, oleh itu, mula berjalan dari 28 Mac 1984 apabila plaintif diberitahu tentang nama syarikat insuran itu, bukan dari 1 April 1977, tarikh kemalangan itu. Jadi, tuntutan itu tidak dihalang had masa.]

[*Editorial Note:* The appeal of the defendant to the Supreme Court vide Civil Appeal No 02–537–90 was dismissed on 20 May 1992 by the court (comprising Harun Hashim, Mohamed Azmi and Peh Swee Chin SCJJ).]

Cases referred to

1 *Beaman v ARTS Ltd* [1949] 1 All ER 465; [1949] 1 KB 550 (folld)
2 *Kitchen v Royal Air Force Association & Ors* [1958] 3 All ER 241; [1958] 1 WLR 563 (folld)
3 *Nathan s/o Arumugam v Chin Jin Tse* [1982] 2 CLJ 555 (refd)

Legislation referred to

Limitation Act 1953 ss 6, 29
Road Traffic Ordinance 1958 s 80
Road Transport Act 1987 s 96
Limitation Act 1939 [UK] s 26

Appeal from: Summons No 63–323–86 (Magistrate's Court, Kuala Lumpur).

RK Nathan (*RK Nathan & Co*) for the plaintiff/appellant.
DC Alfred (*Sengara & DC Alfred*) for the defendant/respondent.

Eusoff Chin J: On 29 July 1988, the learned magistrate dismissed the plaintiff's claim for damages arising out of a motor accident on the ground that the claim was time-barred. The plaintiff appealed against the magistrate's decision to the High Court.

Facts

On 1 April 1977 while the appellant ('the plaintiff') was walking along the edge of Jalan Ampang, Kuala Lumpur, he was knocked down by the respondent ('the defendant') who was riding motor cycle No AF3571. The plaintiff suffered injuries, and was hospitalized.

In August 1979 the plaintiff engaged a firm of solicitors, RK Nathan & Co. In early 1982 the plaintiff called again on his solicitors. On 31 March 1982, the plaintiff's solicitors wrote to the Chief of Traffic Police, Kuala Lumpur, for the relevant police reports so as to ascertain the identity of the defendant. On the same day, the solicitors wrote to the Registrar and Inspector of Motor Vehicles ('the RIMV'), Perak, and sent a reminder on 26 April 1982 for insurance particulars of motor cycle No AF3571.

On 5 May 1982, the RIMV, Perak, informed the solicitors that the file was in Selangor. On 18 May 1982, the solicitors wrote to the RIMV, Selangor. On 8 June 1982, the RIMV, Selangor, wrote to the defendant to supply the insurance particulars of motor cycle No AF3571. The defendant did not reply. On 15 June 1982, the solicitors wrote vide AR registered letter to the defendant which was returned undelivered.

As the solicitors could not get the insurance particulars of the motor cycle from the police, the RIMV and the defendant, the solicitors, on 10 August 1982, wrote to the Motor Insurers' Bureau of West Malaysia ('the MIB'), requesting them to ascertain the identity of the insurers of motor cycle No AF3571 at the date of the accident. The solicitors also undertook to pay all expenses incurred by the MIB in their investigations.

On 18 August 1982, the MIB informed the solicitors that they had sent a circular to all insurance companies to ascertain who the insurers of motor cycle No AF3571 were as on 1 April 1977. The circular was sent out on 16 August 1982 with the request for the insurance company involved to respond not later than 3 September 1982.

Since there was no response from the insurance company insuring motor cycle No AF3571, the MIB appointed Messrs Global Insurance to investigate the matter, which in turn assigned Messrs Giam Adjusters to take over the investigations.

On 31 March 1983 the MIB was still unable to ascertain which insurance company was the insurer of motor cycle No AF3571 at the date of the accident. The limitation period of six years under s 6 of the Limitation Act 1953 ('the Act') expired.

On 17 March 1984, Messrs Global Insurance wrote to the MIB, with a copy sent to the solicitors for the plaintiff, to say that motor cycle No AF3571 was insured with Messrs East West Insurance Bhd ('the insurance company') vide cover note No 5182091. The MIB vide their letter dated 28 March 1984 to the plaintiff's solicitors confirmed this fact.

The plaintiff's solicitors, on 11 April 1984, wrote to East West Insurance Bhd, asking the insurance company to confirm if they were the insurers for motor cycle No AF3571. After sending reminders, the insurance company, on 13 June 1984, replied that they would seek their solicitors' opinion, but they did not confirm that they were the insurers for motor cycle No AF3571.

A It was only on 20 October 1984 that the insurance company's solicitors wrote to the plaintiff's solicitors to the effect that the matter was time-barred. There was still no admission that the insurance company was the insurer of motor cycle No AF3571.

After a series of correspondence between the solicitors for the plaintiff and the insurance company, on 23 July 1985, the solicitors for the insurance company finally said that the insurance company had refused to take over the conduct of the defence as the claim was time-barred.

Meanwhile, the plaintiff's solicitors had filed in the High Court an application for a declaration in another similar case, and the question posed was whether time should run in a case where the plaintiff did not know the identity of the insurance company which insured the defendant's motor vehicle. That case was pending on appeal to the Supreme Court.

As a result, the defendant's solicitors agreed that the plaintiff should not file any claim in the court until the Supreme Court gave its decision.

The Supreme Court's decision in the other case was that the plaintiff should file its claim in the High Court and the defendant there could then raise the issue of limitation, and argue the issue at the proper trial of the claim.

After that, on 20 May 1986 the plaintiff here gave the statutory notice to East West Insurance Bhd under s 80 of the Road Traffic Ordinance 1958 ('the Ordinance'), and filed his claim against the defendant on 22 May 1986.

The issue

The issue is whether the plaintiff's claim is time-barred. The magistrate's court held that the claim was time-barred. The plaintiff's counsel appealed to the High Court.

The arguments

The defendant's counsel agreed with the magistrate. But the plaintiff's counsel said that it was pointless to sue the rider of the motor cycle No AF3571 a man of straw unless the insurance company was willing to accept liability. Otherwise, the plaintiff would end up with a paper judgment. The plaintiff's counsel stated that there was fraud on the part of the insurance company by concealing the fact that it was the insurer of motor cycle No AF3571 at the time of the accident. Because of that, the period of limitation should not begin to run until the discovery of the fraud. The plaintiff had done all he could to discover who the insurance company was, but the insurance company had concealed itself from the plaintiff's knowledge until the period of limitation ran out. He quoted s 29 of the Act and s 80 of the Ordinance.

The relevant law

Section 6(1)(a) of the Act states:

> *Save as hereinafter provided* the following action shall not be brought after the expiration of six years from the date the cause of action accrued, that is to say —
>
> (a) action founded on a contract or a tort;

Section 29 of the Limitation Act 1953 states:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either —
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
> (b) *the right of action is concealed by the fraud of any such person as aforesaid*; or
> (c) the action is for relief from the consequences of a mistake,
>
> the period of *limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake*, as the case may be, or could with reasonable diligence have discovered it. (Emphasis added.)

Section 80 of the Ordinance (now s 96 of the Road Transport Act 1987) states:

> (1) If, after a certificate of insurance has been delivered under subsection (4) of section 75 of this Ordinance to the person by whom a policy has been effected, *judgement* in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) *is given* against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the *insurer shall*, subject to the provisions of this section, *pay to the persons* entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interests on that sum by virtue of any written law relating to interest on judgements.
> (2) No sum shall be payable by an insurer under the foregoing provisions of this section —
>
> (a) in respect of any judgement, *unless before or within seven days after the commencement of the proceedings* in which the judgement was given the insurer had notice of the proceedings; (Emphasis added.)

Findings

I find that the opening words of s 6 of the Act, which are 'save as hereinafter provided', make it plain that the provision in s 6 is to be applied subject to the other following provisions of the Act, and in this case, subject to s 29 of that Act.

If the plaintiff can show to the court that the *right of action* was concealed by the fraud of the insurance company, then the period of limitation would not begin to run until the discovery of the fraud. The plaintiff must, in addition, show to the court that he had, under the circumstances, done all he could to discover which insurance company it was, and had failed to discover it within the limitation period of six years.

From the facts, I find that the plaintiff had done all he could to find out which insurance company had insured the defendant as user of motor cycle No AF3571. The plaintiff's solicitors had written to the police, the RIMV and the defendant. The defendant himself had not been co-operative with the RIMV and the plaintiff in the plaintiff's efforts to ascertain the identity of the insurance company. The Motor Insurance Bureau did what it could

by sending a circular letter dated 16 August 1982 to all insurance companies, requesting the insurer of motor cycle No AF3571 as on 1 April 1977, to inform the MIB. Since no insurance company had responded to the circular, the MIB caused investigations to be carried out. It is to be noted that when the MIB issued the circular letter, *there was another four-and-a-half months to go before the period of limitation ran out on the plaintiff.*

The MIB having completed its investigations, by letter dated 28 March 1984, informed the plaintiff's solicitors that the insurer of motor cycle No AF3571 as on 1 April 1977 was Messrs East West Insurance Bhd. On 11 April 1984 the plaintiff's solicitors wrote to East West Insurance Bhd, and part of the contents of that letter stated:

> We refer to the above matter wherein we act for S Sivapiran, a pedestrian who was knocked down by motor cycle AF3571. We referred this matter to the Motor Insurer's Bureau of West Malaysia and we understand a circular was circulated to all insurers including yourselves on 16 August 1982 a copy of which said letter is enclosed herewith. Obviously you had not responded and they had to investigate and we now forward herewith a copy of their investigations.
>
> ...
>
> We shall be grateful if you would now confirm that you would take over the conduct of this matter.

After a number of reminders, East West Insurance Bhd replied on 13 June 1984 that it was referring the matter to their solicitors. After further reminders to the insurance company, the insurer's solicitors replied that since the first notification to East West Insurance Bhd was made on 11 April 1984, any action to be filed against it would be time-barred.

I think it is necessary to consider the effect of s 80(1) and (2) of the Ordinance (now, with effect from 1 January 1988, s 96(1) and (2) of the Road Transport Act 1987). Under this section, the insurer is not bound by law to pay any judgment sum including interests and costs obtained against the insured 'unless *before*, or *within seven days* after the commencement of the proceedings in which the judgment was given, *the insurer had notice of the proceedings*'.

Subsection (2) of s 80 of the Ordinance therefore requires the plaintiff to give notice to the insurer as stated there, or else the plaintiff, after he has obtained judgment against the defendant, will not be able to enforce it against the insurer. The plaintiff will be taking great risk in proceeding against the driver or rider of a motor vehicle who is not able to satisfy any judgment obtained by the plaintiff. The plaintiff must give the statutory notice under s 80 if he wants to get his judgment satisfied by the insurer.

I can certainly appreciate the dilemma which confronted the plaintiff here. If he had sued the rider of motor cycle No AF3571 within the six years from the date of the accident, he might have ended up with a paper judgment. If, under the circumstances, he had waited to give notice to the insurer under s 80 of the Ordinance, he might have been barred from taking action by s 6 of the Act.

The plaintiff, faced with this dilemma, decided not to proceed against the defendant, but to do all that could be done to ascertain which insurance company was involved so that notice could be given to it under s 80 of the Ordinance.

This is not a straightforward case where a plaintiff is suing a defendant. Strictly, the defendant here is the person who committed the tort, ie the rider of motor cycle No AF3571. But by statute, the insurance company is made liable to satisfy any judgment obtained by the plaintiff against the defendant, provided that the plaintiff first complied with the condition prescribed by s 80 of the Ordinance, which is, that before the plaintiff files his action against the defendant or *within* seven days after filing of the action the insurance company is notified of the filing of the action. It cannot be denied that the party really interested (the defendant) in the result of the action, is the insurance company which is statutorily made liable for the settlement of any judgment obtained by the plaintiff. Because of that, it also cannot be denied that in all claims for damages arising out of a motor accident, the insurance companies will take over the conduct of the defence. Because of the peculiar circumstances which I have just stated, the insurance company is in the position of that of a defendant to the plaintiff's action. Therefore, when considering s 29(b) of the Act, where it is shown that *the right of action* of the plaintiff is concealed by the fraud of the insurance company, that concealment should be treated as that of the defendant in the action.

It is not disputed that the *cause of action* accrued on the date of the accident, ie 1 April 1977. But can it be said that *the right of action* started from that date? Generally, the answer would be in the affirmative. But to *enforce* the right of action, the plaintiff must know who the defendant is. Unless he knows whom to sue, he cannot file his claim in court. It is pertinent to note that while s 6 of the Act deals with '*cause of action*', s 29 of the same Act deals with the '*right of action*'. Section 29 provides that the period of limitation shall not begin to run, in any case where the *right of action* is concealed by the fraud of the defendant or his agent, until the plaintiff has discovered the fraud, or could by reasonable diligence have discovered it.

In other words, where the defendant by his fraud conceals the plaintiff's right of action against the defendant, and where that fraud is not discovered by the exercise of reasonable diligence on the part of the plaintiff, the period of limitation does not begin to run until the plaintiff discovers the fraud.

What is the meaning of 'fraud' in s 29 of the Act? It may be helpful to look at the decisions of the English courts on the meaning of 'fraud', because s 26 of the Limitation Act 1939 (UK) is in pari materia with s 29 of the Act. The decisions of the English Court of Appeal in *Beaman v ARTS Ltd*[1] and *Kitchen v Royal Air Force Association & Ors*[2] evolved two principles. First, fraud under s 26 of the Limitation Act (UK) does not necessarily mean deceit in the sense in which it is known in common law; and secondly, the type of conduct which amounts to fraud is the type of conduct which was known in the chancery court as equitable fraud. In the *Kitchen* case,[2] Lord Evershed MR said [at p 249]:

> It is now clear, however, that the word 'fraud' in s 26(b) of the Limitation Act 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v ARTS Ltd* ([1949] 1 All ER 465) that no degree of moral turpitude is necessary to establish fraud within the section. *What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt*

to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. (Emphasis added.)

So, on the facts of the case before me, I find that though the plaintiff knew the rider of the motor cycle which had knocked into him, the plaintiff had no knowledge as to which insurance company was the insurer of the motor cycle No AF3571. The plaintiff has shown to the court that he had done all he could to discover or ascertain the insurance company involved. But the insurance company had deliberately withheld knowledge of itself from the plaintiff by not responding to the MIB circular letter. It was only discovered after the MIB had carried out its investigation. The defendant himself had not supplied the RIMV with the name of the insurance company which insured the rider of the motor cycle No AF3571, nor did he mention the name of the insurance company in his police report made after the accident. All these had set the plaintiff and his solicitors to embark on a long trip to discover and ascertain the insurer of the motor cycle. On the facts, I find that it is a most unconscionable thing for the insurance company to do to conceal itself from the knowledge of the plaintiff in order to take advantage of the limitation period, and to prevent the plaintiff from proceeding against the defendant (which by statute includes the insurance company). What had been done by the insurance company amounts to fraud under s 29 of the Act, and by that fraud, the insurance company had concealed the *right of action* of the plaintiff to sue the defendant within the six-year limitation period.

For the reasons given, I am satisfied that in this case, although the *cause of action* accrued on 1 April 1977, the *right of action* of the plaintiff had been concealed by the fraud of the defendant and the insurance company. I find that the plaintiff could only enforce his *right of action* against the defendant on 28 March 1984 when the plaintiff was first told by the MIB the name of the insurance company which had insured the defendant's motor cycle. I have stressed earlier, that by virtue of s 80 of the Road Traffic Ordinance, it would be an exercise in futility for the plaintiff to proceed against the defendant unless he has first given notice to the insurance company under this section. I, therefore, hold that the period of limitation did not begin to run against the plaintiff until 28 March 1984, when the plaintiff first had knowledge of the name of the insurance company. It is true that the plaintiff did not immediately file his claim in court after he discovered the name of the insurance company, but I am also satisfied with the explanation given by the plaintiff for not doing so immediately. It is because the plaintiff was told by the solicitors for the insurance company not to file the claim yet, but to hold on until the Supreme Court made its decision in an appeal which might affect the plaintiff's claim.

The case of *Nathan s/o Arumugam v Chin Jin Tse*[3] was referred to for my consideration. The facts there are similar to the facts here, but though there were arguments on the interpretation of s 29 of the Act, there appears to have been no arguments advanced to the court there, on the effect of s 80 of the Ordinance. In that case, the High Court decided that whereas there was provision in the Limitation Act 1939 (UK) for the English courts to

extend the limitation period, our Limitation Act contains no such provision, and therefore the High Court in *Nathan*'s case[3] refused to extend the limitation period. I do not dispute that the courts cannot extend the limitation period under the Act.

In the appeal before me, I am concerned with whether, on the facts of the case, the limitation period should *not* begin to run because the facts show that the plaintiff could not enforce his *right* of action due to the concealment of that *right* to proceed, by the fraud of the defendant and his insurer. It is wrong, in my view, to consider the provisions of s 29 of the Act in isolation. The court must consider s 29 of the Act and s 80 of the Ordinance together because s 80 of the Ordinance makes it mandatory for the plaintiff to give the requisite notice before the insurance company can be made statutorily liable to settle the judgment obtained by the plaintiff.

I allowed this appeal with costs.

Appeal allowed.

Reported by Wong Kim Fatt